FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA, *Appellant,*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Appellee.*

On Appeal From the Appellate Court of Illinois, Second District

REPLY BRIEF FOR THE APPELLANT

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INTRODUCTION

Appellant takes issue with the manner in which the facts of this case are treated in appellee's brief. The appellee would have this Court believe that the complaint for search warrant established that patrons of the tavern were narcotics purchasers (Brief of appellee, p. 3) and that the sale of heroin at the tavern was "open and notorious". (Brief of appellee, pp. 6-7, 22). Both of these assertions are untrue. The complaint for search warrant (A. 3) does not even mention the patrons, and neither the complaint nor the testimony presented at the suppression hearing indicates that the patrons would have been aware that nar-

cotics were being sold in the bar. These facts will be discussed more fully in the body of this brief. (See pages 7-12, 15-16, *infra*).

ARGUMENT

I

Since the Initial Frisk of All of the Patrons of the Aurora Tap by a Police Officer Was Not Based Upon a Reasonable Belief That the Patrons Were Armed or Dangerous, the Initial Pat-Down and Subsequent Search of One of the Patrons, Ventura Ybarra, Was Illegal.

As the appellee itself concedes, it has advanced a new theory to justify the search of Ventura Ybarra. (Brief of appellee, p. 8) The trial and Appellate courts held the search justified under *Ill. Rev. Stat.*, 1975, Ch. 38, Sec. 108-9(b), which allows police officers executing a warrant to search all persons present to prevent the disposal or concealment of the items named in the warrant. The appellee now contends that the search of Ybarra was proper without regard to the statute, because it was performed with probable cause. This contention is made despite the fact that at the hearing on the motion to suppress in the Circuit Court of Kane County, Illinois, the prosecutor conceded that probable cause to search Ybarra did not exist. (A. 39)

Specifically, the appellee argues that the first pat-down search of Ybarra was a reasonable search for weapons, and that this pat-down yielded probable cause to believe that Ybarra possessed contraband. Both of these contentions are incorrect. The facts of this case demonstrate that the initial pat-down was impermissible, and, in any event,

the pat-down did not yield probable cause to justify a full search. Part A of this argument will deal with the question of the validity of the initial pat-down. Part B of the argument will deal with the validity of the second search.

A. The Rule Proposed by the Appellee—That a Pat-Down for Weapons of All Persons Found at a Public Establishment Where Police Officers Are Executing a Search Warrant Is *per se* Reasonable, So Long As the Officers "Do Not Have Reason to Believe That the Persons On the Scene Have No Relationship Whatever to the Premises or the Drugs Being Sought"—Would Result in the Search of Countless Citizens Whom the Police Had No Reason to Fear.

The appellee's first argument is that the initial frisk of Ventura Ybarra and all of the other patrons of the Aurora Tap was permissible as a reasonable weapons frisk. However, in order to reach this conclusion, the appellee finds it necessary to propose a *per se* rule, which it phrases in various ways. In the "Questions Presented" portion of its brief the appellee puts the question this way:

> Is it reasonable, under the Fourth Amendment and this Court's decisions in the *Terry v. Ohio* line of cases, for officers executing a search warrant seeking heroin allegedly being offered for sale in a small tavern[1] to frisk all patrons present at the time? (Brief of appellee, p. 1)

The appellee's answer to this question is yes. In the heading to Argument IA of its brief, the appellee asserts:

> It is *always* reasonable for officers to frisk all fully clothed adults on the premises, where the officers are

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[1]The tavern was actually described as a *large* one-room tavern. (A. 59)

> executing a search warrant for heroin and the complaint has informed them that some or all of these persons are users and/or dealers in heroin.[2] (Brief of appellee, p. 9) (Emphasis added)

In the body of Argument IA, the appellee requests:

> . . . that this Court allow a limited pat-down search for weapons of all fully clothed persons old enough to carry them on the premises where a search warrant is being executed for heroin or similar hard, mind-altering narcotic drugs, where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought. (Brief of appellee, p. 17)

No matter how the appellee's request is phrased, its contention that the pat-down of the patrons was permissible cannot be based on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Terry*, the Court held that where a police officer possesses a reasonable belief, based on specific and articulable facts, that a person is armed and dangerous, a frisk for weapons is permissible. *Terry*, 392 U.S. at 27. By contrast, the appellee asks this Court to fashion a rule that would permit police officers executing a search warrant to search *all* persons present for weapons even though the officers did not have any suspicions regarding those persons. Moreover, the statement of the appellee's proposed rule at page 17 of its brief includes the assertion that a search of all persons on premises where a search warrant is being executed should occur

[2]The complaint in fact did not so state. See pages 7-8 of this brief for a fuller discussion of the contents of the complaint for search warrant.

"where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought." This unique rule would apparently place the burden on the person about to be searched to show that he had no relationship to the premises or the contraband in order to avoid being searched, instead of placing the burden on the police to articulate the reasons for intrusion. Under this rule, if the police knew nothing about a person present where a warrant was being executed, they could search him.

The appellee's proposed rule would run directly contrary to the general rule that an intrusion on Fourth Amendment rights must be based on reasonable and articulable suspicion at the least. *Delaware v. Prouse*, _____ U.S. _____, 99 S. Ct. 1391, 59 L.Ed. 2d 662, 669 (1979); *Brown v. Texas*, _____ U.S. _____, _____ S. Ct. _____, 61 L.Ed. 2d 357 (1979). Appellee's position would also be contrary to the rule that a person's mere presence at the scene of suspected criminal activity cannot justify a search of that person. *Sibron v. New York*, 392 U.S. 40, 62, 88 S. Ct. 1889, 20 L. Ed. 2d 917, 934 (1968). (See original brief of appellant, p. 14). Finally, it would conflict with the proscription against "general warrants" contained in the Fourth Amendment. *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). (See original brief of appellant, p. 15). Moreover, such a rule would permit the search of countless citizens whom the police had no reason to fear. Any citizen enjoying a meal at a restaurant, shopping at a store, or sitting in a bar would be subject to search simply because someone on these premises was engaged in criminal activity.

Apparently, the appellee finds it necessary to adopt such an extreme position because the facts of this case demonstrate that the officer who frisked Ybarra and all of the other patrons had neither probable cause nor articulable suspicion regarding Ybarra or any other patron. An examination of the facts will demonstrate this.

First of all, contrary to the appellee's contention, the complaint for search warrant did not indicate explicitly or implicitly that the patrons of the Aurora Tap were narcotics purchasers or users. The pertinent portion of the complaint states as follows:

> 3. The informant related to me that over the weekend of 28 and 29 February he was in the tavern described and observed fifteen to twenty-five tin-foil packets on the person of the bartender "Greg" and behind the bar. He also has been in the tavern on at least ten other occasions and has observed tin-foil packets on "Greg" and in a drawer behind the bar. The informant has used heroin in the past and knows that tin-foil packets are a common method of packaging heroin.
>
> 4. The informant advised me that over the weekend of 28 and 29 February he had a conversation with "Greg" and was advised that "Greg" would have heroin for sale on Monday March 1, 1976. This conversation took place in the tavern described. (A. 3)

Nowhere in this complaint are the patrons of the Aurora Tap even mentioned. The complaint does not allege that the informant ever saw a sale of narcotics to anyone, does not allege that a sale had ever taken place in the tavern, does not allege the name of anyone who might be purchasing narcotics, does not allege that the informant knew Ventura Ybarra or any other patron, does not allege that Greg, the alleged seller of narcotics, would be present in the bar on March 1, does not allege that any sale of narcotics would take place in the tavern, and does not allege at what time of day Greg would be selling heroin. Moreover, there was no showing in the complaint that anyone besides Greg who was connected with the tavern, nor any patron, ever sold or purchased narcotics in the bar or elsewhere, which is especially significant in light of the fact that there was no testimony that Greg was even present in the bar when the officers arrived. In short, the complaint for search warrant gave the police no reason to suspect any of the bar's patrons of any illegal activity.

In addition, the testimony of Officer Jerome Johnson, the officer who searched the patrons, indicates that he did not suspect, and had no reason to suspect, any patron of possessing a weapon or contraband. Johnson admitted that he had no indication that Venturra Ybarra or any other patron was violating any law (A. 28), and that he did not know any of the patrons and had not seen any of them before. (A. 26) Johnson also testified that Ybarra gave no indication of having a weapon (A. 27), made no gestures or other actions indicative of criminal conduct (A. 28), and did not act in any threatening manner. (A. 29) This testimony demonstrates that the pat-down of the patrons was not based on any reasonable or articulable suspicion, but was done simply as a matter of course.

Considering the facts outlined above, the authorities cited by the appellee do not support its assertion that the

pat-down in this case was permissible. The cases cited by the appellee have not adopted the *per se* rule suggested by the appellee; these authorities have generally required reasonable suspicion before a pat-down is permitted. Since the officers in this case had no suspicion at all, these cases actually support the appellant's position that the pat-down was improper. Likewise, while the interest in police safety is indeed a compelling one, that interest does not even come into play where, as here, the officers did not have any fears regarding the persons searched.[3]

What the appellee suggests in its brief is that, despite the absence of any reasonable belief that any of the patrons is armed or dangerous, a pat-down for weapons of all persons present is always permissible when police officers are executing a search warrant. This contention should be rejected, and the judgment of the Appellate Court should be reversed.

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[3]In any event, it is completely irrelevant that of the 27 cases selected by the appellee for inclusion in its brief, six involved the recovery of weapons, or that of the 60 raw police files examined by the appellee's *amicus curiae* (the accuracy of which cannot be established), 52% involved recovery of weapons. (Brief of appellee, p. 15) The appellee does not contend that these cases constitute a statistically accurate sample of any larger group, and thus they stand only for the proposition that the appellee and its *amicus* were able to find several instances where weapons were recovered during the execution of search warrants. Moreover, the appellee has failed to demonstrate that this danger to officers requires that officers be allowed to search for weapons without and articulable suspicion, or that the power already given to police officers by this Court in *Terry v. Ohio, supra*, is insufficient to deal with the problem. Neither the appellee nor the *amicus* has shown that the searches in the cases they refer to were made without probable cause or reasonable suspicion.

B. Even If the Initial Pat-Down of Ybarra and the Other Patrons Had Been Proper, Which It Was Not, the Second Search of Ybarra Was Not Justified.

As discussed in Argument IA, *supra*, the initial pat-down of Ventura Ybarra and all the other patrons of the Aurora Tap was impermissible. However, even if one assumes that this initial procedure was proper, the second search of Ventura Ybarra, which resulted in the discovery of contraband, was not permissible.

During questioning by defense counsel at the suppression hearing in this case, Officer Jerome Johnson testified that when he first patted down Ventura Ybarra, he found nothing upon him. (A. 28) However, on cross-examination he testified that he felt a cigarette pack with objects in it. (A. 32) Officer Johnson did not immediately seize this item or direct any other officer to do so. Instead, he proceeded to search all of the other patrons of the tavern. (A. 32) At trial, Officer Johnson testified that prior to this second search he had no knowledge that Ybarra had anything on his person that was violative of any statute. (A. 59)

Based on the above set of facts, the appellee contends that when Officer Johnson undertook the second search of Ventura Ybarra, he had probable cause to believe that Ybarra possessed the contraband described in the warrant. The basic flaw in the State's reasoning is the assumption that when Officer Johnson felt "a cigarette pack with objects in it" in Ybarra's pants pocket, this gave him probable cause to believe that Ybarra had some of the contraband for which they were searching. Clearly, Officer Johnson did not believe that Ybarra possessed any contra-

band, for he testified that prior to the second search he did not have any knowledge that Ybarra had any contraband on his person. (A. 59) Johnson could have reached no other conclusion, for it is not logical to infer from the possession of a cigarette pack "with objects in it" that those objects are contraband. Officer Johnson had no idea what the objects in the cigarette pack were. The objects could have been cigarettes, a lighter, or a book of matches. Johnson's honest admission that he did not believe that Ybarra had contraband on his person before the second search indicates that nothing in his experience as a police officer led him to believe that the cigarette pack contained contraband, and this statement by the officer is, contrary to the State's contention, entitled to great weight. (Brief of appellee, p. 19) Indeed, the observations or inferences of the officer who conducts the search have always been given paramount importance in determining the permissibility of searches. See, *e.g., Terry v. Ohio, supra,* 392 U.S. at 4-7. In this case, where the police officer admitted he did not believe that Ybarra had contraband, where the prosecutor at trial conceded that there was no probable cause (A. 39), and where the facts support the conclusion that probable cause did not exist, the appellee's contention to the contrary is meritless.[4]

[4]The appellee contends at page 19 of its brief that ". . . Agent Johnson was not given the opportunity during direct or cross-examination at the suppression hearing to itemize and explain all the factors which gave him probable cause to conduct the second search and retrieve the heroin packets from Ybarra's pockets". On the contrary, Agent Johnson had ample opportunity to explain his action.

In short, even had the initial pat-down been permissible, Officer Johnson lacked probable cause to justify the second search. The judgment of the Illinois Appellate Court which approved the search should therefore be reversed.

II

The Facts of the Instant Case Show That the Search of Ventura Ybarra Was Not Based On Probable Cause or Reasonable Grounds to Believe That He Was Connected to the Premises or the Criminal Activity Under Investigation, or That He Might Dispose of the Warrant's Objects. Thus, Regardless of How Other Cases May Have Construed *Ill. Rev. Stat.*, Ch. 38, Sec. 108-9 and Statutes Similar to It, the Application of That Statute To Permit the Search In This Case Violated the Fourth Amendment.

Argument II of the appellee's brief advances the proposition that the initial pat-down of Ybarra and all the other patrons was permissible not as a weapons frisk, but as a search for narcotics.

The appellee's extensive discussion of the law in this argument is irrelevant, once the facts are viewed in their true light. The appellee's argument is that Illinois cases have construed the instant statute so as to require a reasonable belief that the person searched poses a threat to the officers conducting the search, is concealing contraband, or is connected to the premises searched. The appellee notes that similar statutes have been so construed in other states. Appellant fails to see the relevance of these other cases,

The reason that "the factors which gave him probable cause" do not appear on the record is that it is obvious from Johnson's testimony that he did not have such probable cause. Indeed, at the suppression hearing, the prosecutor conceded that probable cause simply did not exist. (A. 39)

for here the Illinois Appellate Court did not, explicitly or implicitly, advance such a requirement in upholding the search of Ybarra. Instead, the Illinois Appellate Court used the statute to permit a search that was not based on probable cause, reasonable suspicion or any other objective standard. Regardless of how other courts have dealt with statutes such as this, the Appellate Court's interpretation of the statute brings it directly into conflict with the Fourth Amendment. The statute is thus unconstitutional as it was applied here.

The legal question to which the appellee addresses itself in Argument II of its brief is whether the search of a person present where a search warrant is being executed should be permitted only when the officers have probable cause to believe the person possesses the items being searched for, or whether some lesser degree of suspicion should suffice. Appellant contends that the probable cause standard should apply, but this question does not control the outcome of this case, for no matter how low a degree of suspicion is required, the search of Ybarra was impermissible. The appellee offers the following test:

> . . . this Court should employ the *Terry* balancing test to allow searches of persons on compact premises specified in the warrant[5], when there is information that drug trafficking is taking place at that location and the police have a reasonable belief that the persons present are connected with the criminal activity and are likely to be concealing the objects of the warrant in their clothing. (Brief of appellee, pp. 39-40)[6]

[5]The premises in this case were described as one *large* room. (A.59)

The fact relied upon by the State to support the proposition that the officers here had a reasonable belief that the persons present were connected with the criminal activity is that the patrons "were connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open and notorious." (Brief of Appellee, p. 38) The assertion that narcotics dealing in the Aurora Tap was "open and notorious" is totally unsupported by the record. There is not the slightest evidence that the narcotics supposedly being dispensed there were in view of the patrons of this public place. The informant, in his complaint for search warrant, stated only that he observed tinfoil packets on the person of the bartender and behind the bar. He did not see them being sold to patrons, he did not see them out in the open, and he did not see them in the possession of anyone but Greg. The officers who arrived to execute the warrant saw no narcotics being

[6]At page 40 of its brief, appellee indicated that this would be only "a brief pat-down to discover forms in an individual's clothing which would give probable cause to believe he was carrying illicit drugs." Appellant fails to understand what use a pat-down would be in discovering contraband. While the form of a weapon is immediately apparent from the outside of clothing, the form of contraband is not. As this case demonstrates, almost any object felt through clothing *could* conceivably contain contraband, but almost any object could also have an innocent explanation. The feeling of an object which could contain contraband would not give the police probable cause to search further, and thus the pat-down will be useless to the police. Only a full search can result in the discovery of contraband, and probable cause should be required before such a search is permitted.

used or sold, and no narcotics were within the view of any of the patrons or the officers. In short, the idea that narcotics dealing was open and notorious at the Aurora Tap is wholly unsupported by the record in this case. And, as discussed previously at pages 7-12 of this brief and pages 10-13 of appellant's original brief, both the objective facts and the testimony of the searching officer make it clear that he had no suspicions of any kind regarding Ybarra or any other patron.

Since there are no facts which would give rise to reasonable suspicion that the patrons possessed narcotics, even this standard is not met. Appellant believes that if the officers sought to search any patron for narcotics, they could do so only if they had probable cause to believe that the patron was concealing narcotics. See *State v. Lewis*, 115 Ariz. 530, 566 P. 2d 678, 680 (1977). However, under any standard the intrusion in this case was not justified. The judgment of the Illinois Appellate Court should therefore be reversed.

CONCLUSION

For the reasons stated above, the search of Ventura Ybarra was a violation of the Fourth Amendment. The judgment of the Illinois Appellate Court should therefore be reversed.

Respectfully submitted,

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